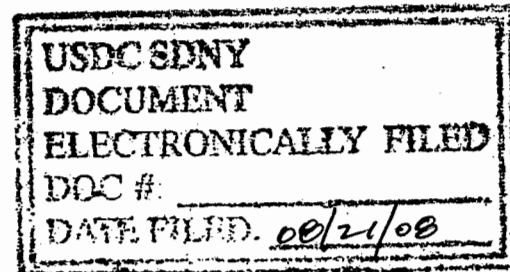


THE LAW OFFICES OF

STEVEN L. KESSLER

August 21, 2008



BY FACSIMILE and OVERNIGHT MAIL

The Honorable Kevin Nathaniel Fox
United States Magistrate Judge
Southern District of New York
500 Pearl Street
New York, N.Y. 10007

MEMO ENDORSED

Re: *Kapiti v. Kelly et al.*
07 CV 3782 (RMB)

Dear Magistrate Judge Fox:

As counsel for plaintiff Mark Kapiti, I write regarding the telephone conference with the Court yesterday afternoon.

Your Honor set noon tomorrow as the time for a status report regarding plaintiff's execution of defendants' designation of agent form to unseal the records of his acquittal pursuant to CPL § 160.50. I will be out of town tomorrow. Accordingly, I am submitting this letter to the Court today.

I contacted my client regarding the conference with the Court. It remains beyond belief, both to me and my client, how and why an innocent individual is being compelled by a federal court to give up his valuable rights and permit someone access to files that were sealed by a state judge when the someone seeking access to the sealed file already has the documents to which he seeks access. As discussed in detail in my letter of yesterday to Your Honor – which was not acknowledged or discussed during the telephone conference – defendants have conceded that their deposition witness possessed a copy of every document in the sealed file long before this case was commenced. Thus, defendants are pretending to need documents that they already have and, worse, are attempting to shorten plaintiff's time to appeal Judge Berman's order by disingenuously arguing that they have an urgent need for these documents to which they already have access.

The Honorable Kevin Nathaniel Fox
August 21, 2008

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To date, the Courts have bought into defendants' arguments. So that plaintiff and his counsel are not held in contempt, last night, Mr. Kapiti executed the designation defendants have sought from him. That designation is enclosed herein. However, given that plaintiff intends to seek leave to appeal Judge Berman's order and has 30 days from August 19 to do so, and further considering that my office will be effectively closed from tomorrow until after Labor Day, the petition and motion for stay to the Second Circuit will not be filed before September. Accordingly, plaintiff requests that the Court hold the designation in escrow during this period. As defendants concede that they have already seen what is in plaintiff's file, they will not be prejudiced by this application. In sharp contrast, if the file is unsealed before plaintiff has had an opportunity to seek appellate review, plaintiff will be irreparably harmed. Once the unsealing is permitted, it cannot be undone. Despite the risk to plaintiff's statutory rights, we are showing our good faith by entrusting the Court with this document. We hope, in return, that the Court will grant plaintiff his request.

Thank you for your consideration to this matter.

Respectfully submitted,

Steven L. Kessler

Steven L. Kessler (SK-0426)

SLK:rmaf
Encl.

cc: Counsel for defendants

8/21/08
Application denied.
SO ORDERED:
Kevin Nathaniel Fox
Hon. Kevin Nathaniel Fox
United States Magistrate Judge

**DESIGNATION OF AGENT FOR ACCESS TO SEALED
RECORDS PURSUANT TO NYCPL 160.50[1][d]**

I, Mark Kapiti, DOB: 8/18/70, SS# 127-68-3266, pursuant to CPL § 160.50 [1][d], hereby designate MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, or his authorized representative, as my agent to whom records of the criminal action terminated in my favor entitled People of the State of New York v. Mark Kapiti, Indictment No. 26125C-2006, in Supreme Court, County of Bronx, State of New York, relating to my arrest on or about May 15, 2006, may be made available.

I understand that until now the aforesaid records have been sealed pursuant to CPL § 160.50, which permits those records to be made available only (1) to persons designated by me, or (2) to certain other parties specifically designated in that statute.

I further understand that the person designated by me above as a person to whom the records may be made available is not bound by the statutory sealing requirements of CPL § 160.50.

The records to be made available to the person designated above comprise all records and papers relating to my arrest and prosecution in the criminal action identified herein on file, with any court, police agency, prosecutor's office or state or local agency that were ordered to be sealed under the provisions of CPL § 160.50.

Mark Kapiti

Mark Kapiti

STATE OF NEW YORK)
) SS.:
COUNTY OF ~~NEW YORK~~)
Westchester

On this 20th day of August, 2008, before me personally came Mark Kapiti, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Steven L. Kessler

NOTARY PUBLIC

STEVEN L. KESSLER
Notary Public, State of New York
No. 03-468840
Qualified in Westchester County
Commission Expires February 26, 2010

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To: **Hon. Kevin Nathaniel Fox** Date: **August 21, 2008**
ACC David Hazan

Fax #: **212-805-6712** Pages: **4, including this cover sheet.**
212-788-9776

From: **Steven L. Kessler**

Subject: ***Kapiti v. Kelly et al.***
Docket No. 07 CV 3782 (RMB)

COMMENTS:

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